FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA, *Respondents*

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL., *Respondents*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

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BRIEF OF AMICUS CURIAE ON THE MERITS

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

INTEREST OF THE AMICUS CURIAE

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to federal and state legislation relating to civil rights and to fair educational practices, and to the equal protection provisions of the United States Constitution. CANI is an offshoot from University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters toward the re-establishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxy.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country.

It has brought together professionals from every discipline, women and men, blacks and whites, Christians, Jews, and myriad denominations, renowned academics with many years of tenure, and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Sub-Committee, including:

Walter Berns
Bruno Bettelheim
Ruth Bevan
Joseph Bishop, Jr.
Daniel Boorstin
Edgar Borgatta
Paula Sutter Fichtner
Sidney Hook
Erich Isaac
Paul O. Kristeller
Ernest Nagel
Norma L. Newmark
W.V. Quine
Paul Seabury

Milton Friedman
Richard Gardner
Nathan Glazer
Oscar Handlin
Gertrude Himmelfarb
Seymour Siegel
Miro Todorovich
Eugene Wigner
L. Pearce Williams
Cyril Zebot

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-called reverse discrimination against qualified applicants for academic positions in university admissions and employment. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. This material was then used subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance Programs, the Secretary of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare and officials of the Executive Office of the President. Representatives of CANI have testified at congressional hearings and at those held by such agencies as the Equal Employment Opportunity Commission and the United States Commission on Civil Rights. Representations have also been made to various regional units of HEW's Office for Civil Rights, and to local university administrations. Factual materials have also been put at the disposal of interested individual members of Congress. Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert quotas for members of selected racial or ethnic groups, or women, in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements have led them to believe that they would be given

the opportunity to acquire further skill or knowledge, or to use their scholarly abilities, found themselves discriminated against for no other reason than their race, ethnicity or sex.

The question of the constitutionality of the establishment of racial or sex quotas, or of discriminatory preferences for members of selected groups without the establishment of a quota, is clearly of vital importance to members of the Committee.

Deeply concerned by what it has viewed as an erosion of constitutionally guaranteed individual rights—including the right to be free from discrimination based on race, ethnicity and sex—CANI has filed briefs as amicus curiae in a number of significant cases including *Regents* v. *Bakke, Cramer* v. *Virginia Commonwealth University, DiLeo* v. *Regents of the University of Colorado,* et al., and *State of Wisconsin (Department of Administration),* et al., v. *Department of Industry, Labor and Human Relations, John T. Patzer, and Madison Building Trades Council.* In each instance, CANI has, as here, taken the position that all forms of discrimination are Constitutionally impermissible.

QUESTION PRESENTED

Does Federal law, which protects both blacks and whites from discrimination in employment practices, nonetheless permit such discrimination if the perpetrator alleges a motivation rooted in "affirmative action", or in remedying "underutilization," or in remedying prior discrimination against others?

INTRODUCTION

It cannot be questioned that voluntarily instituted reverse discrimination by an employer is flagrantly illegal.[1] Indeed,

[1] Twelve cases so holding are cited at Point IV-A, and some of them are also noted at the end of Point II.

none of the Petitoners was able to cite in its Brief even one case allowing an employer to set up a quota scheme and discriminate against white and/or male employees. On the contrary, numerous cases have struck down such quotas, as this Amicus will document, *infra.* To escape the impact of this indubitable fact the three Petitioners use a variety of arguments seeking to sidestep proper characterization of the real issue in the case, which has been decided against their position, in other cases in the past. This Brief will identify and expose such hypotheses.

This case has arisen because Petitioners have fundamentally refused to acknowledge the basic meaning of our nation's civil rights laws. Those statutes were enacted only after long and bitter struggles in which actual lives were lost—by both blacks and whites, working in the cause of human brotherhood and human rights. The statutes outlawing employment discrimination do not ban merely discrimination against minorities. They flatly forbid such acts against *any* person. In the words of this Court, "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971).

The laws mandate that a person be regarded as an *individual,* not as a member of a particular group to which he or she may belong. Any historic type of discrimination against members of certain groups is not to be used as an excuse for instituting such discrimination against members of other groups. In the present case, Petitioners have failed to realize that non-minority workers do not have a lesser right to be free from discrimination than their minority colleagues possess. Nor do the non-minority employees enjoy a greater right. Rather, they possess the *same* right.

If anything, racial discrimination is more reprehensible today than it was a generation ago, for nowadays there are no excuses left. At that time, attitudes had not yet changed, the law was not nearly as well developed as it is today, and the

essential wrongness of discriminatory acts had not penetrated the minds of key decision makers in American industry. In 1979, it is clear that much progress has been made. Discrimination against minorities is condemned by both law and generally accepted practice in American industry. Where it still occurs, even the perpetrators dare not try to justify it openly, but attempt to give lip service to concepts of brotherhood and civil rights. But where discrimination against non-minorities is suggested as a means of "making up" for discrimination against minorities—or for the general socioeconomic disadvantages that many minority people endure, whether or not they have been specifically discriminated against—the reaction, unfortunately, is often different.

Many employers, and some unions, believe that they should have *carte blanche* to disregard—unilaterally and in their own unreviewable discretion—every legal safeguard that now protects present and prospective employees from discrimination on the grounds of race, color, sex, religion, national origin, or any other characteristic, as long as the employer or union alleges a motivation rooted in "affirmative action" to increase the body count of workers from a particular race or other group.

Thus, what is at stake in this case is whether an individual's legal right to be free from discrimination, and his chances for meaningful, fulfilling employment and a worthwhile career can, in effect, be consigned to the waste heap by the self-serving decisions of employers and unions.

The arguments presented by Petitioners here, and by other perpetrators of such discrimination, are merely special instances of the classic ploy so often used by those who defend discrimination in any form—the idea that the discrimination in question is somehow for the good of society. As will be shown in the argument herein, Petitioners' policies and practices of "reverse discrimination" offend various legal provisions, including the Fifth Amendment, Title VII of the Civil Rights Act of 1964, 42 USC §1981 and Executive Order 11246.

Furthermore, minorities and women themselves (as documented *infra*), can and have been direct victims of reverse discrimination, *i.e.*, discrimination perpetrated against members of *any* group, not for the traditional motives of bigotry, but for "affirmative action" purposes. And, furthermore,

> "There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweigh any temporary gains they might bring.
>
> One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical—and profoundly mistaken—view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes must be given something in order to have something.
>
> Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills, and self discipline."

Testimony of Bayard Rustin and Norman Hill (of the A. Phillip Randolph Institute), *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Part 2A at 253.

Last Term, this Court, weathering a deluge of Briefs, faced the problem posed by a white would-be medical student confronted by an admissions policy which favored non-minority applicants and excluded him from admission. Now, the focus is upon the same concept clothed in employment, as opposed to admissions, terms. While factually inapposite to the *Weber* history of events, many of the reasons set forth in Mr. Justice Powell's opinion explaining why a racially-based two track system in a state medical school's admissions practices was illegal apply also to the instant case, where Kaiser and the Union had set up a two-track system of job selection. *Regents of the University of California* v. *Bakke,* 57 L.Ed. 2d 750, 767-790 (1978).

SUMMARY OF ARGUMENT

This Brief will demonstrate that Petitioners' course of conduct violated 42 USC §1981, Executive Order 11246, Title VII of the Civil Rights Act of 1964, and in the case of the Government, the equal protection guarantees of the Fifth Amendment.

The Brief explains how the idea that outright discrimination is permissible in the name of "affirmative action" destroys not only the valuable concept of affirmative action but also fundamentally contravenes the laws safeguarding civil rights. The harm that reverse discrimination inflicts on minorities and women themselves—both because it stigmatizes them and because they are sometimes the actual victims of preferences carried out in favor of *other* "protected" groups—is made clear.

Two statutes—42 USC §1981 and Title VII of the Civil Rights Act of 1964, as interpreted by the courts and (in the case of Title VII) the Equal Employment Opportunity Commission—outlaw reverse discrimination. Although courts have, in some cases, imposed "remedial" quotas in cases of proven prior discrimination, such decisions do not in any way justify Petitioners' adoption of a quota which inflicted serious harm on plaintiff and his class, simply in order to improve Kaiser's "body count" of minority group craftsmen. The argument that the quota at issue here was a permissible remedy for possible discrimination is shown to rest on a false analogy between the kind of employer conduct ruled illegal in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), and Kaiser's prior employment practices, as well as a distortion of the circumstances that would justify the imposition of a quota even in an actual case of proven employment discrimination.

One semantic note: although this Brief, of necessity, frequently uses the phrase "reverse discrimination," that term is a misnomer, for what it really refers to is one species of discrimination itself, not the reverse of it. Nonetheless, along with "preferential treatment," the phrase must perforce be used for want of a generally accepted better appellation. (Perhaps "Affirmative Discrimination," the title of Professor Nathan Glazer's recent book, is a more accurate name for the phenomenon.)

POINT I: THE QUOTA SCHEME VIOLATED EXECUTIVE ORDER 11246

A. Executive Order 11246 Forbids All Discrimination in Employment by Government Contractors

Kaiser and the Government have tried to justify the reverse discrimination here under Presidential Executive Order 11246, as amended, 3 CFR 169 (1974), reprinted following 42 USC §2000e. The Executive Order requires that Federal contractors explicitly promise (by means of a mandatory clause in each contract) to (1) refrain from employment dis-

crimination and (2) to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Section 202(1).

This Amicus, as an organization strongly devoted to the eradication of discrimination, regards the Executive Order, which is the latest in a succession of such orders originating in the administration of Franklin D. Roosevelt in 1941, as a significant and substantial step forward in overcoming discrimination.

Precisely for that reason, this Amicus believes that firm corrective action must be taken now that the Government's "implementing" regulations have distorted the affirmative action obligation into a program of preferential treatment for members of selected groups, thus discriminating against innocent members of other groups.

It must be emphasized that not only does the Executive Order's basic outlawing of discrimination prohibit the conduct that took place here (by forbidding discrimination by the contractor "against any employee or applicant for employment because of race, color, religion, sex, or national origin. . ."), but, the very heart of the affirmative action obligation imposed by the Order, as quoted above, addressed itself to eliminating any vestiges of racial discrimination.

Indeed, it would be necessary for Kaiser, if it is truly to comply with the strictures of the Executive Order, to engage in a program of *affirmative action against the reverse discrimination it has perpetrated,* by dismantling its quotas and guaranteeing *all* potential candidates for its craft training programs that their race will not be held against them.

(It should be noted that the Court below erred in lumping together the Executive Order itself with certain regulations promulgated by the Department of Labor that supposedly implement the Executive Order, and in branding the Executive

Order itself as possibly illegal. 563 F.2d at 227. The regulations in question, confusingly, also contain the word "order" in their title; they are known as "Revised Order No. 4." It is those regulations which this Amicus believes are illegal [and *not* the Executive Order]; they call for the numerical goals which the Court below correctly termed indistinguishable from quotas. 563 F.2d at 222. We feel that while this error must of course be corrected by this Court, it does not in any way vitiate the force or correctness of the decision below.)

B. The Regulations Issued Supposedly to Implement the Executive Order Mandate Illegal Quotas

To clarify the nature of the regulatory scheme involved here, it should be explained that the Executive Order, in §201, delegates responsibility for enforcement to the Secretary of Labor. He, in turn, has delegated most enforcement duties to the Office of Federal Contract Compliance Programs (OFCCP) within the Department. 41 C.F.R. §60-1.2.

The Secretary of Labor has issued regulations for implementation of the Executive Order by non-construction contractors. 41 C.F.R. Part 60-2, "Affirmative Action Programs" (officially known as "Revised Order No. 4," and hereinafter cited as "R.O. 4"). These regulations require, among other measures, that employees perform a "utilization analysis" with respect to existing and potential minority and female representation in their work forces, and set numerical "goals and timetables" for hiring and promotion to overcome any "underutilization" found to exist. 41 C.F.R. §60-2.10. Goals are set by the employer subject to review by the appropriate compliance agency, after the employer has performed a "utilization analysis" with respect to women and minorities in his existing work force, the minority and female populations in the areas from which he can recruit, and the portions of those populations possessing the requisite skills and knowledge for employment in his organization. Also to be considered are how many women and minorities are employed in the local area,

and the availability of actual and potential training opportunities both in the community and within his own organization. 41 C.F.R. §60-2.11.

Each instance of "underutilization" must be explained. This word is defined as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability." *Id.* R.O. 4 states that in addition to the utilization analysis, "an acceptable affirmative action program must include. . .goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies [*i.e.*, any instances of underutilization found] and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist." 41 C.F.R. §60-2.10.

(In the present case, it would seem that Kaiser was *not* underutilizing minorities as craft workers, since it had hired every minority craftsman it could find. There were no unemployed black craftsmen in the area from whom Kaiser could recruit employees, evidently because the few qualified blacks had all been hired by other employers, whether or not under preferential quota schemes. Union's Brief, 11. [Indeed, this is also one of the reasons why Kaiser could not have been found guilty of violating Title VII by not employing more black craftsmen, since there were no unemployed black craftsmen on whom it could draw.] Thus Kaiser would not have had to set goals for employing minority craftsmen.)

Kaiser and the Government raise some confusion citing decisions such as *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971). In no way does that line of cases constitute authority for the blatant discrimination here. The numerical goals upheld by *Contractors Association* had been imposed under Executive Order 11246 in a situation replete with prior discrimination by the six construction unions involved, which had excluded blacks. 442 F.2d at 173.

Furthermore, the goals, according to the court, could be met "without adverse effects on the existing labor force" which was essentially transitory and often in short supply for key trades. *Id.* at 176. Not only was no preferential treatment authorized or required under the so-called "Philadelphia Plan," but the Plan itself provided that any discriminatory usage of numerical goals was to be the subject of sanctions by the Department of Labor. *Id.* at 164. As the Plan puts it, "[t]his commitment [to establish and meet goals] is not intended and shall not be used to discriminate against any qualified applicant or employee." *Id.*

To repeat, the goals, according to the court, could be met "without adverse effects on the existing labor force" which was essentially transitory and often in short supply for key trades. *Id.* at 176. But does such a situation exist—*can* it exist—whenever goals are set in diverse job fields other than construction? Certainly, in university employment, the demand for employment far outstrips the number of available posts.

Sec. 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), which bans preferential treatment to correct alleged "imbalances" in employment figures, has been rejected by some courts as a bar to the establishment of "goals" under the various "construction worker plans," whether Federally or state-imposed. See, *e.g., Contractors Ass'n., supra,* 442 F.2d at 172.

However, no case[2] thus far has dealt with the application of §703(j) to a situation involving "goals" for non-fungible workers, and where preferential treatment is bound to occur for reasons that the Third Circuit panel in *Contractors Ass'n* expressly found to be absent in the particular situation before it. Furthermore, some members of the Second Circuit Court of Appeals bench believe that this section may well circumscribe the courts' own powers to remedy proven discrimination, which would seem to be broader than the Executive's power to require "goals" for "underutilization." *See* Feinberg, Cir. J., concurring

[2] See decision below, 563 F.2d at 219.

in *E.E.O.C.* v. *Local 638... Local 28 of the Sheet Metal Workers' International Ass'n,* 532 F.2d 821 (2d Cir. 1976), at 833-34, citing prior opinions by Hays, Cir. J., and himself. Indeed, Judge Feinberg suggests that §703(j) bars remedial quotas in cases of proven blatant discrimination, even those quotas set under the strict *Kirkland* standards (discussed *infra*) *Id.*

This is a far cry from the assertion in *Contractors Ass'n* that §703(j) does not bar goals since that section applies only to Title VII and does not limit other Federal remedies under such programs as those based on Executive Order 11246. 442 F.2d at 172. The court failed to realize that the Executive Order does not and cannot require or authorize an employer to breach statutory law, nor can the Labor Department acting thereunder. However, since *Contractors Ass'n* found that no preferential treatment was authorized or required under the Philadelphia Plan, and indeed that reverse discrimination would not occur in implementing the Plan, this conclusion with regard to §703(j) is really a dictum.

While the *Contractors Ass'n* line of cases has indeed emphasized that the Executive in some ways has wider powers than the courts to remedy proven discrimination, it must be remembered that in the case of Federal contractors, goals are required not to correct prior discrimination, but to halt "underutilization," a meaningless status whose existence is determined by an absurd and arbitrary statistical exercise. Thus, §703(j) might well bar a blanket requirement of goals for Federal contractors that "underutilize" minorities or women. In any event though, the Act's prohibition of discrimination, §703(a), 42 U.S.C. 2000e-2(a), standing alone, is a fully effective bulwark against reverse discrimination because it outlaws *all* discrimination in any term, condition, or privilege of employment.

Similar considerations apply to other cases upholding state-imposed construction worker plans modeled on the Federal effort in Philadelphia, such as *Associated General Contractors*

v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); and *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D.N.J. 1970).

Although the numerical goals upheld in *Contractors Association* were imposed on employers who had not themselves discriminated, that is only to be expected in the construction industry, where workers are chosen through union hiring halls that service employers (who do not themselves routinely screen those referred to them). P. Nash, "Affirmative Action under Executive Order 11246," 46 *N.Y.U.L. Rev.* 225, 232 (1971). The employers were thus in privity with the unions, even though the former had not joined in the discrimination committed by the latter.

C. The Experience of Colleges and Universities Exemplifies the Bitter Harvest from the Maladministration of Executive Order 11246

Higher education, of course, has traditionally—along with other institutions in American life—shown in its faculty employment patterns the effect of our country's socioeconomic problems. To an unknown extent, however, these patterns also indicate results of personal preference and individual choices as to lifestyles among specific population groups. That is, it is not necessarily true that any statistical distribution of various population groupings in higher educational faculty employment is caused by employment discrimination by colleges and universities. Rather, it may be an indirect result of discrimination in some other aspect of society, or may simply stem from still other factors contributing to occupational choice and mobility, including those having nothing to do with bigotry or mistreatment. *See, e.g.,* J.H. Bunzel, "The Quota Mentality," *Freedom at Issue,* Nov.-Dec. 1973, reprinted in *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Part 2B, 1172, at 1176-78.

Be that as it may, however, a major emphasis in the Executive Order enforcement policies of the Government has been directed toward higher education. Although the Department of Labor recently has now received all contract compliance duties under the recent Presidential Civil Rights Reorganization, it was the Department of Health, Education, and Welfare that originally had that responsibility, which was handled by HEW's Office for Civil Rights (OCR).

(The recent changeover to direct Labor Department control of the compliance process may lead to even worse abuses than OCR has perpetrated, since OFCCP is controlled by industry-oriented administrators even less conversant with education-related matters than their counterparts, and who tend to take an even harder, more "fundamentalist", line toward setting and enforcing goals.)

A spate of articles protesting HEW's overreaching in this role began appearing in academic publications as well as the popular media after 1970, but OCR only intensified its efforts.

Certainly it would appear that priorities may have been misplaced, especially since the need for much of this effort was, at best, dubious—and its results have been largely negative. *See generally,* T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47.

Despite the university officials' feelings about the Federal regulatory efforts, however, their institutions stood to lose a great deal if found in noncompliance, and this factor may have accounted for much of their reticence with respect to resisting HEW in a spirited manner. Consider, for example, these statistics on the universities' stake in payments under Federal contracts for research and other purposes:

> "As early as 1967, the federal government was annually disbursing contract funds to universities at the rate of three-and-a-half billion dollars a year; recently the Carnegie Commission suggested that federal contract funding be increased by 1978 to

> thirteen billion dollars, if universities are to meet their educational objectives. Individual institutions, notably great and distinguished ones, already are extraordinarily dependent on continuing receipt of federal support. The University of California, for instance, currently (1970-71) depends on federal contract funds for approximately $72 million. The University of Michigan, periodically harassed by HEW threats of contract suspension, cancellation, or nonrenewal would stand to lose as much as $60 million per annum. The threat of permanent disqualification, if consummated, could wholly wreck a university's prospects for the future."
>
> P. Seabury, "HEW and the Universities," *Commentary,* Feb. 1972, 38, at 39.

In view of this, it is understandable why, for example, the University of Michigan alone spent $350,000 in gathering various statistics necessary to satisfy HEW. T. Sowell, *supra,* at 57.

And it is also understandable that the universities were under great pressure to satisfy HEW by committing reverse discrimination, to raise their "body counts" of minority and female faculty.

For a wide-ranging investigation, including a good collection of hard-to-find source materials, see *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations Before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess. (1974), Parts 2A and 2B (2 volumes), especially the articles by E.F. Borgatta, J.H. Bunzel, R. Gambino, B. Lorch and P. Seabury; and see also S. Johnson, "It's Action, But Is It Affirmative?" *New York Times Magazine,* May 11, 1975, 18 (concerning the efforts of HEW to impose its goal-quotas on the University of California at Berkeley), and M. Sherman, "Affirmative Action and the AAUP," *AAUP* [Amer. Ass'n of University Professors] *Bulletin,* Winter 1975, 293.

The next sub-point will demonstrate, using higher education as the prime (but not exclusive) example, that "goals" are inherently illegal quotas.

D. "Goals" Are Quotas

The idea of numerical goals for increases in minority and female employment was not originally postulated as part of the affirmative action concept. It was first used by the Labor Department in the famous "Philadelphia Plan" for minority hiring in the construction trades, but was later extended to non-construction contractors by R.O. 4. *See* P. Nash, "Affirmative Action under Executive Order 11246," 46 *N.Y.U. L. Rev.* 225 (1971).

From the start of these efforts, a frequent criticism has been that the goals were really quotas. See, for example, decision below, 563 F.2d at 222, n.10 and accompanying text.

Once set, these quotas are to be striven for, despite being nothing but sheer arbitrary guesswork. The very threat of sanctions being applied if the figures are not met—regardless of how patiently the Government listens to explanations of *why* they are not met—is of course the most effective means of enforcing the quotas (especially since the sanctions can include severe delay or loss of millions of dollars in contract funds).

> "Even if an employer were in theory permitted to demonstrate that he had not discriminated, and that he had undertaken affirmative action although his employment figures were inadequate, the practicalities of proof might mean that statistical shortcomings are all but impossible to rebut. Indeed, even if actual litigation does demonstrate that the inference from statistical inadequacy can be overcome, employers may *believe* that the statistics will operate conclusively, that sanctions may attach, and that it is therefore safer simply to steer clear of trouble and meet the figures agreed upon through 'preferential' hiring".
>
> Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 *Harv. L. Rev.* 1109, 1302 (1971).

Nonetheless, however, the proponents of numerical goals, by asserting the palpable lie that goals are really different from quotas, and by repeating it long enough and loudly enough, have drowned out all the opposition that might arise from even a cursory glance at any dictionary's definition of the word "goal." The obvious contradiction in terms between deliberate efforts to reach a goal in employment or promotion—that is, a specific body count in terms of group identification—and efforts not to discriminate is ignored. Surely, however, everyone with a minimal education should know that the word "goal" means an "objective." Operating under a non-discriminatory personnel selection system is basically incompatible with trying to reach, as an "objective," a previously set numerical distribution of the race, ethnicity and sex of those selected.

In fact, the Government's use of "goals" entails a perversion of the widely-accepted concept called "management by objectives." Managers in industry, and—increasingly —administrators of universities and colleges, are accustomed to thinking of "goals" as organizational objectives which they themselves help to set and which then *must* be obtained. See, *e.g.*, P. Drucker, *Management: Tasks, Responsibilities, Practices* 430-42 (1974). "Management by objectives" (often abbreviated "MBO") originated in the business world but is rapidly spreading to non-profit institutions and is now even encountered in such fields as prison administration.

The use of the term "goals" is entirely proper and appropriate in MBO programs, which seek to impose concrete and, where possible, quantifiable objectives to be reached in running an organization or developing an enterprise. Indeed, some aspects of promoting equal opportunity might well lend themselves to being crystallized and implemented by this approach. However, it is clearly illegal to regard as a management goal or objective the selection of a specific absolute number or per-

centage of persons from given groups for any job, position, award or other status. This is because the law mandates that there be no discrimination whatever in the making of such choices; if there is to be no discrimination, the decision-maker cannot possibly know in advance, *nor should he attempt to estimate,* the numbers of persons from various population groups to be selected. If he tries to reach a particular number, he will be discriminating, for, to reiterate, the idea of *non-discrimination is fundamentally contradictory to the idea of achieving a particular "body count" as a "goal."*

Furthermore, even the existence of such an estimate (including one that merely purports to be an approximation of what would be accomplished under non-discriminatory selection, with only legitimate and proper affirmative action used) is inherently discriminatory. It will have a "chilling effect" on non-discriminatory selection (especially by subordinate managers afraid to displease their superiors) and also on applications by non-minority persons and males, who will understandably develop a "what's the use?" attitude.

For these reasons, the voluntary variety of goal-setting by employers would seem to be illegal, just as avowed quotas are. For it to be mandated by Government regulations, with the "goals" themselves enforced by threat of drastic sanctions, would seem to be flagrantly unconstitutional. Whether voluntary or mandated, the creation and administration of goals would seem to violate §703(a)(2) of Title VII, 42 U.S.C. §2000e-2(a)(2), which states that an employer may not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities. . ." on the basis of race, sex, etc.

All this is most ironic, as well as illegal. See T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47.

Indeed, as Professor Sowell (who is black) demonstrates,

> (a) Underutilization, insofar as it exists, stems not from employer discrimination but from a dearth of qualified minority and female academics. *Id.* at 55-59, *passim.*
>
> (b) While blacks and women are "underrepresented" in academe in comparison with their proportion in the general population, they are *over*-represented in academe in comparison to the proportion of Ph.D.s they hold. Women hold only 10% of the Ph.D.s but comprise over 20% of the academics. Blacks hold less than 1% of the Ph.D.s but are more than 2% of academics. *Id.* at 55.
>
> (c) Minorities and women made most of their progress in the academic world *before* goals and timetables were applied. *Id.* at 64.
>
> (d) To the extent that the so-called elitist and exclusionary "old-boy network" of Ph.D. alumni from highly prestigious institutions really exists, at least as high a percentage of black and female Ph.D.s as white male Ph.D.s hold their degrees from these top-rated universities. *Id.* at 60.

Furthermore, the idea of numerical goals was formulated with respect to construction work jobs, for which qualifications are (1) standardized, (2) objectively measurable, (3) possessed by a relatively large number of persons, and (4) relatively unimportant over the minimum degree of qualification, so that any "qualified" candidate can satisfactorily fill the position.

In contrast, the qualifications for university faculty positions are (1) decidely non-standardized, (2) subjective in nature, (3) possessed by a very small number of persons and (4) the degree of qualifications over the minimum is vitally important; not just any "qualified" candidate, but only the *best-*

qualified candidate can satisfactorily fill the position. In other words, university professors, and university faculty positions, are most definitely non-fungible.

In order to set a goal, a university department (or any other employer) has to predict with yearly timetables (1) the number of openings that will become available to it over the next three to five years, (2) how many "minority" persons and women will be minimally qualified even to be *considered* for such openings at a particular future time, (3) how many of such persons will actually apply for each such job, (4) how many of the persons described under point (3) *would be better qualified than any other candidate* for the jobs in question and thus would merit and receive job offers from the department, and (5) how many of the persons described in point (4) would accept these offers. This is clearly so superficial and tenuous an exercise in approximation as to be completely absurd.

In the cases upholding numerical goals imposed under Executive Order 11246, the programs in question dealt only with fungible employees, *and* with only one category of those: construction workers. (It should be noted that any one who has ever complained about the way buildings are "put up" nowadays might well want to question the assumption that one construction tradesman is interchangeable with the next—a supposition based on the notion that all master craftsmen in the same craft are equally proficient. But the exploration of that concept is beyond the scope of this Brief.)

For these purposes, it suffices to note that one can presume the fungibility of construction workers inasmuch as the industry itself does so. Although merit tests may be applied in deciding whether one is to be certified as skillful in a certain craft, it is routine for a contractor to put in a call to a union hiring hall for the number and type of workers needed. The contractor does not routinely screen those who are referred to him. And the hiring halls refer workers on a seniority or experience basis. P. Nash, *supra,* at 232. Thus, there is no real selection process by the employer, and fungibility can therefore be said to exist.

This, though, is *not* true in such fields as maintenance or clerical work; and whereas all professional, technical, and executive workers are, almost by definition, non-fungible, professors are even more so—in ways that fundamentally relate to the nature of scholarship, research and university-level teaching.

Consider, for example, that in seeking out prospective new faculty members, department chairmen are *not* looking for those whose "job skills" match those of the current faculty. This is in sharp contrast with "normal" employment practices and with the concepts underlying R.O.4. In most cases, it is a *unique* person who is sought—one whose skills, interests and areas of competence are different in specific ways from those of the present staff. Such factors must be considered if scholarly and research "strengths" are to be built up (or maintained) in a department—experts in different areas and with different approaches are needed. One thus has still another reason why the level and accuracy of prediction necessary to set goals for faculty hiring and promotion would be impossible, even if it were possible in other "professional" fields—there is no "standardized" conception of just what kind of person is needed. *See* T. Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter 1976, 47, at 59.

Such "problems" are inherent in higher education because of its very nature. A professor, while he may have some surface similarities with elementary and secondary school teachers, is, however, charged not with "pass[ing] on existing learning without interfering with it in any way, but [with being] an interpreter, reviser, and even creator of the very knowledge he or she passes on." Editorial, *Measure,* No. 37, Jan. 1976, 1, at 4.

It must also be noted that in the academic world, with most of the few qualified minority persons already ensconced in jobs, the pressure to achieve goals leads inevitably to a game of "musical chairs," with each institution trying to "raid" others for minority faculty by offering even higher salaries and more perquisites—far more than an equivalent non-minority profes-

sor would receive. This is of course illegal—it is really reverse discrimination in employee compensation. It is the norm, however. See, *e.g., Scott* v. *University of Delaware,* 455 F.Supp. 1102, 1110, 17 FEP Cases 1486, at 1493-4, 18 EPD ¶8783, at pp. 5201-2 (D. Dela. 1978), *appeal pending* (U.S. Ct. App., 3d Cir.).

POINT II: THE QUOTA SCHEME VIOLATED THE FIFTH AMENDMENT

Government pressure has coerced many employers to create quota schemes, in order to satisfy contract compliance officers and retain lucrative Federal contracts. In the instant case, it is clear that Government pressure virtually forced a conspiracy between Kaiser and the Union to satisfy the Government by inflicting very real harm on innocent third parties. Union's Brief, 8; Kaiser's Brief, 4, 5, 18-9, 50; Government Brief, 11. (Even though it was not a Federal contractor, the compliance officers were able to pressure the Union, too. Executive Order 11246, §§203(c), (d); 207.)

Such coercive Federal tactics resulting directly in the infringement of individual rights violated the Equal Protection guarantees of the Fifth Amendment, for despite the Government's evident view that the desirability of raising the "body count" of minority and female gross employment statistics outweighs other individuals' rights to be free from discrimination, numerous decisions of this Court have held equal protection rights to be personal and individual in nature and *not based in group membership.* Among such cases are *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948), and *Sweatt* v. *Painter,* 339 U.S. 629, 635 (1950). Thus, every individual has an *equal* right to be free from discrimination.

To enforce the Government's quotas, employers (and unions too) violate Federal civil rights law, and the Government knows and intends this. In trying to meet goals, employers (as did Kaiser here) intentionally discriminate, and this is

inevitable in view of the kind of psychological and legal pressures goals exert upon them, inasmuch as discrimination is the only way of attaining these arbitrarily-set figures.

The intent to commit such discrimination can be imputed to any state or Federal governmental agency which brought it about. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 169 (1970). The involvement of government need not be "either exclusive or direct". *United States* v. *Guest,* 383 U.S. 745, 755 (1965). Even if the discrimination is merely authorized or encouraged by the government, rather than commanded, it is still deemed discriminatory governmental action. *Reitman* v. *Mulkey,* 387 U.S. 369, 375-76, 381 (1967). Incitement and coercion of discrimination by Federal agencies violates the Due Process Clause of the Fifth Amendment to the same extent that equivalent action by state agencies violates the Fourteenth Amendment guarantee of equal protection. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975).

Assuming, *arguendo,* that an additional link in the chain is required to show Government involvement in forcing discriminatory selection, this Court may infer it from the well-known doctrine that one will be deemed to have intended what he knew or should have known to be the inevitable (or even highly probable) consequences of his action.

Therefore, the Government's actions in this case violate the Fifth Amendment.

Indeed, *at least seven* of the decisions which have struck down reverse discrimination against state and local government employees have rested on Fourteenth Amendment equal protection grounds, in whole or in part. These cases, all fully cited at Point IV-A, *infra,* include *Anderson; Brunetti; Hiatt; Int'l Assn. of Firefighters; Chmill; Detroit Police Officers Ass'n;* and *Chance.*

POINT III: THE QUOTA SCHEME FLAGRANTLY VIOLATED WEBER'S RIGHTS UNDER 42 USC § 1981

Although, as mentioned in Weber's Brief in Opposition to Certiorari, at 7, Weber originally sued on the basis of 42 USC §1981 as well as Title VII, neither the District Court nor the Court of Appeals decisions below discussed §1981. However, it would seem that §1981 is by itself dispositive of this case. It possesses the distinct advantage of not being open to the kind of obfuscation that Kaiser, the Union and the Government have been able to heap on the Title VII aspects of the litigation. The false analogies that those parties have been able to derive by dragging in such matters as the fact that courts sometimes impose quotas in cases of proven prior discrimination, the preference for voluntary compliance as a device for settling Title VII claims, and the "adverse impact" doctrine of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), are not really available to them in a §1981 context.

The statute reads in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens...."

Four years ago, this Court unanimously ruled that §1981, derived from The Civil Rights Act of 1870, prohibits racial discrimination in private employment. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975).

Subsequently, the Court held that §1981 protects whites as well as blacks from racial discrimination in employment. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 286-7 (1976).

While that case of reverse discrimination did not arise in an affirmative action context, a Federal district court had previously held that a white student who had been refused

consideration for a position in a large firm's Summer Internship Program for minority students had a valid cause of action under §1981. *Hollander* v. *Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn. 1975).[3]

Thus, this Amicus submits that §1981 expressly bans the discrimination practiced by Petitioners against Mr. Weber and his class.

Section 1981, as interpreted by *McDonald*, applies to this case even though *McDonald* was decided after the District Court decision in this case was rendered. An appellate court applies the law in effect at the time it decides the case, even if the law has changed since a decision below. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281 (1969).

POINT IV: PETITIONERS' COURSE OF CONDUCT CLEARLY AND FLAGRANTLY VIOLATED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Title VII Outlaws Voluntary Preferences for Members of Selected Minority Groups

Several cases have struck down voluntarily-instituted schemes to preferentially hire or promote minority group persons (or women), on the grounds that such action violated the rights of non-minorities (and men) under Title VII. Among these decisions are *Anderson* v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D. Cal. 1972); *Brunetti* v. *City of Berkeley*, ____F.Supp.____, 12 FEP Cases 937, 11 EPD ¶10, 804 (N.D. Cal. 1975); *Jones* v. *Middendorf*, 454 F.Supp. 1276 (E.D. Okla. 1978); *Detroit Police Officers Ass'n* v. *Young*, 446 F.Supp. 979 (E.D. Mich. 1978); *Jackson* v. *Poston*, 40 A.D.2d 19, 337 N.Y.S.2d 108, 5 FEP Cases 283, 5 EPD ¶8025 (3d Dep't 1972); *Chmill* v. *City of Pittsburgh*, 375 A.2d 841 (Pa.

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[3] To be distinguished from that Court's subsequent ruling, after submissions in lieu of a trial, that plaintiff was in fact not harmed. 450 F.Supp. 496 (1978).

Comonwealth Ct. 1977); *Hiatt* v. *City of Berkeley,* 85 Cal. App.3d 29, 149 Cal.Rptr. 155 (Cal.Ct. App. 1978).

These decisions, it would seem, fill up any lacunae remaining after this Court handed down its unanimous holding that Title VII protects whites as well as blacks. *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976). (Although it involved reverse discrimination, that case had not arisen in an affirmative action context.)

Other cases invalidating reverse discrimination in employment, but not on Title VII grounds, include *State Dept. of Administration* v. *Dept. of Industry, Labor & Human Relations,* 252 N.W.2d 353 (Wisc. Supreme Ct. 1977); *Ruddy* v. *Connelie,* 61 A.D.2d 372, 402 N.Y.S. 2d 245 (3d Dep't 1978); and *Fraternal Order of Police* v. *City of Dayton,* 35 Ohio App.2d 196, 301 N.E. 2d 269 (1973).

Also of great relevance is *Chance* v. *Board of Examiners,* 534 F.2d 993, 998-9 (2d Cir. 1976), *cert. denied sub nom. Council of Supervisors & Administrators* v. *Chance,* 431 U.S. 965 (1977). This decision struck down blatant reverse discrimination concerning seniority benefits (as does the instant case), although in the context of layoffs, rather than hiring or promotion.

B. The Decisional Administrative Interpretation of Title VII by the Equal Employment Opportunity Commission Forbids Voluntary Preferences on the Basis of Race or Sex

The general rule that an administrative agency's interpretation of a statute which it administers is entitled to great deference from the courts has been strongly adhered to by this Court with respect to Title VII and its enforcement by the Equal Employment Opportunity Commission. *Griggs* v. *Duke Power Company,* 401 U.S. 424, 433-34 (1971). It is therefore of great importance in the disposition of the present case to look carefully at what E.E.O.C. decisions have held with respect to

preferences instituted voluntarily by employers to favor minority group members in selective processes such as promotion.

In at least two decisions, the Commission has held that such preferences violate Title VII. E.E.O.C. Decision No. 75-268, 10 FEP Cases 1502, 1503-04, CCH E.E.O.C. Decisions ¶6452 (1975); E.E.O.C. Decision No. 74-106, 10 FEP Cases 269, CCH E.E.O.C. Decisions ¶6427 (1974).

These decisions explicitly reject reverse discrimination, making it clear that such practices are as illegal as discrimination against women or minorities.

Indeed, ironically, in Decision No. 75-268, the charging party, a white person who was the victim of reverse discrimination on the grounds of race, was a woman. Thus it is seen once again that the victims of reverse discrimination are not limited to the male sex, and that members of groups which have been the traditional targets of prejudice and bigotry can find themselves hurt anew by the overreaching of those who have appointed themselves as "philosopher-kings" with the wisdom and the power to suspend all the laws and constitutional provisions against employment discrimination and substitute their own discretion.

It would seem that the precedential value of these two decisions is not vitiated by the recent issuance of EEOC's Affirmative Action Guidelines, 44 Fed. Reg. 4421 (1979), which purport to authorize the institution of quota schemes by employers.

C. The Impact of this Court's Decision in *McDonald* Cannot be Undone by a Mere Resort to the Phrase "Affirmative Action," in a Self-serving Context

The argument presented by the Union is premised upon the notion that the decision of this Court in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), can be cast aside merely by the Union's enunciation of the magic words "affirmative action." Union's Brief, 23.

The Union points to a footnote in the *McDonald* decision stating that the case did not deal with the "permissibility of such a program" (*i.e.*, an affirmative action program), "whether judicially required or otherwise prompted." 427 U.S. at 281 n.8. Although this Amicus can cite numerous other court decisions which do deal with such programs, and which strike down quotas and reverse discrimination,[4] we also point out that what Kaiser and the Union entered into in the present case was not a bona fide affirmative action program, but rather a conspiratorial, self-serving effort to avoid law suits, possible liability, and pressure from the Government, at the expense of innocent third parties. Although this Amicus believes that the responsibility for creating such a situation is that of the Government, which exerted unlawful pressure on the Union and which continues to do so on employers throughout the country, the co-conspirators which actually entered into the quota scheme at issue here cannot completely escape accountability.

The Union attempts to convince the Court that despite *McDonald,* the intent of Congress in enacting Title VII was that unions and employers, while they could not be forced to adopt quotas, either by the Executive Branch or by the courts, would be free to adopt them voluntarily. Of course, such quotas would be permissible only if they discriminated against white males, rather than (say) blacks; the Union is maintaining that a double standard exists under Title VII, whereby white male

[4] See cases discussed *supra* at Point IV-A.

workers do not have the right to be free from discrimination although blacks do. We note that the Union does not maintain that the quotas it defends were adopted to remedy prior discrimination. Rather, it says, they were adopted to "eliminate racial imbalance." Union's Brief, 21 & 73. Because the "body count" of black workers is not what the Union might want it to be, white workers are to be subjected to discrimination on a grand scale to fix up the statistics. The Union argues that this is what Congress intended when it enacted Title VII.

The Union sets forth a lengthy analysis of the legislative history of Title VII. However, this is of limited usefulness, since "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455, 460 (5th Cir., 1970), quoted approvingly in *E.E.O.C.* v. *Mo. Pacific R.R.,* 493 F.2d 71, 74 (8th Cir., 1974). This Court has, however, unanimously endorsed the analysis of that legislative history contained in Mr. Justice Marshall's opinion in *McDonald,* and this Amicus will not attempt to embellish that exposition, which—unlike the views put forth by the Union—is consistent with the statutory language that outlaws discrimination against all persons.

D. The Entire Question is Misconstrued and Wrongfully Characterized by the Petitioners

Petitioners try to show that the voluntarily-adopted quota was justified, despite the lack of a court order or even a finding that discrimination had occurred.

Their argument is rooted in some fundamental distortion of both fact and law.

First,

> "... Title VII does not require that an employer's workforce be racially balanced in all areas. Underutilization in some categories and overutilization in others is to be expected, and does not necessarily demonstrate discrimination."

Croker v. *Boeing Co.*, 437 F.Supp. 1138, 1185 (E.D.Pa. 1977).

Second, it is not true that whatever amount of discrimination may exist in the building construction trades totally handicapped Kaiser's pre-1974 minority workers from acquiring the experience necessary to enter Kaiser's pre-1974 training programs. In carpentry, painting and general repair (the specialties covered by the pre-1974 training program), many craftsmen can and do obtain experience by working in a non-construction field such as maintenance (from which minorities are not barred). Employment and Training Report of the President, Transmitted to the Congress in 1976 [U.S. Gov't Printing Office Stock No. 02900000254-1], at 73-74, 76.

Third, even if, *arguendo*, a Title VII violation could be said to exist, in view of Kaiser's former prior experience requirement for craft jobs, a quota should not be imposed in a case like this even by a court. Such discrimination, if it were found to have existed, would not have been deliberate and willful. Instead, it would have been rooted in "adverse effect" without "business necessity"—the kind of unintentional breach of the law proscribed by *Griggs*. A court in such a case should not impose a quota remedy.

At least one Court of Appeals has denied quota relief for identified individual victims of such "unintentional" discrimination, because neither of two prerequisites had been met. There had not been a "clear-cut pattern of long-continued and egregious racial discrimination." Second, the effect of the reverse discrimination stemming from the proposed court-ordered quota would not have been "unidentifiable," *i.e.*, such effects would have been visited on a relatively small ascertainable group of non-minority individual whites, instead of on the public at large. *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427, *rehearing denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). Applying the *Kirkland* test to the present case, it is clear that quota relief should be denied since the hypothetical discrimination under discussion was unintentional, and the harmful results of the quota would indeed be focused on an ascertainable group—Mr. Weber and his class.

A subsequent decision by the Supreme Court of New Jersey firmly upholds the same principle. *Lige* v. *Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976).[5]

Actually, far from being the victims of discrimination, Kaiser's minority employees are, in many cases, the *beneficiaries* of discrimination. Kaiser admits that since 1969, initial hiring at the plant has been carried out on a "50-50 minority—non-minority basis." Kaiser's Brief, 3 & n.1. Although not a subject of litigation here, that quota is surely a violation of both 42 USC §1981 and Title VII. It is also a violation of Executive Order 11246, even though such hiring was allegedly instituted "as a result of the 'recommendations' of a compliance officer." *Id.* Although this quota was not litigated in the instant case, its existence shows that the minority employees have already received unfair preferential treatment. Since the proportion of minorities in the local workforce is 39% (Union's Brief, 13), a 50% quota for hiring minority workers accords them even more than proportional representation in the plant's ranks, and has a serious impact on the 61% of the local work force composed of non-minorities.

It is thus clear that the only violations of Title VII (and 42 USC §1981) that actually exist on these facts were and are being committed either unilaterally by Kaiser or jointly by Kaiser and the Union—in favor of minority applicants and workers, and against non-minorities.

Kaiser's Brief (at 23-27) refers repeatedly to the preference for "voluntary compliance" with Title VII by employers and unions. However, this of course begs the question, since the issue before the Court is whether what Kaiser and the

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[5] Accord, *Hull* v. *Cason*, 18 FEP Cases 1379 (Calif. Ct. App. Dec. 28, 1978) (Oakland Fire Dep't).

Union did here constituted compliance with the statute, or rather constituted a violation of it. What they actually did was "volunteer away" the rights of third parties like Mr. Weber.

The Briefs of Kaiser and the Government often refer to the use of "race conscious" steps as a correct description for what was done in this case. But that phrase seems deliberately ambiguous. Certain "race conscious" action would be quite permissible. (An example would be advertising for workers in a newspaper oriented toward the minority community, as well as advertising in the general press.) By lumping such innocuous activities together with measures that discriminate against non-minority employees, however, these Petitioners further manage to confuse issues.

All three Petitioners point proudly to the elimination of the prior experience requirement for craft jobs at the time the quota system was instituted, as an example of Kaiser's benevolence toward white employees as well as blacks. They point to the new opportunities this created for those white Kaiser employees without prior craft experience. But of course they fail to mention that Kaiser could have implemented this salutary step without imposing racial quotas.

This Amicus submits that *all* "remedial priorities" voluntary imposed by an employer unilaterally or in concert with a union, whether or not discrimination had in fact previously occurred in the particular establishment, must be totally barred. No employer or labor organization should have the power to place itself above the laws forbidding discrimination. Unquestionable, no such entity could do so with the purpose of discriminating against minorities or women, and the law must not tolerate a double standard by which an employer or labor organization is permitted to inflict on non-minority employees the kinds of harm that they are barred from visiting on minority employees.

To conclude the discussion on this point, this Amicus wishes to highlight one additional fundamental flaw in any rule

permitting "do-it-yourself" quotas to be imposed jointly by a union and an employer who think that they may have been violating Title VII: such a rule would let the two contracting parties enter into a conspiracy to harm others in order to avoid liability for themselves. An employer and a union, realizing that one or both of them may be in trouble with the law, would not be required to assume the burden of atoning for whatever they have done wrong. Instead, they could visit employment discrimination on innocent third parties. Such discrimination would be much more vicious than that which is normally perpetrated on minorities, for the non-minority victims contemplated by the Union's "solution" would have *no remedy,* whether in government civil rights agencies or in the courts, for the grievous wrongs they would suffer: they would just have to "stand there and take it."

It would certainly seem that an employer and union which have a concern about possible liability under the civil rights laws would be—to put it mildly—directly confronted by a conflict of interests of tremendous magnitude, if it were possible for them to use as one option for escaping such liability the imposition of discriminatory measures against non-minority employees. But Petitioners' "solution" is to allow employers and unions that very option, in clear violation of Title VII and §1981. This Amicus respectfully submits that the Court should take the opportunity of the present case to foreclose any resort to such cynical and cruel measures. If crass self-interest and blatant disregard for innocent third parties' basic human rights are permitted to flourish under the rubric of "affirmative action," not only would the valuable concept embodied in that phrase be perverted beyond repair, but all our laws against employment discrimination would become a farce and a mockery.

Employers and unions must not be allowed to become "a law unto themselves" and decide when and against whom they can legally discriminate. To quote a famous self-appointed arbiter: " 'I'll be judge, I'll be jury,' said cunning Old Fury; 'I'll

try the whole cause, and condemn you to death.' " L. Carroll, *Alice's Adventures in Wonderland,* Ch. 3. That, we submit, is *not* the kind of decision-making contemplated by Congress when it enacted 42 USC §1981 and Title VII, nor by President Johnson when he promulgated Executive Order 11246.

E. Judicial Decisions Requiring Quotas to Remedy Proven Prior Discrimination Neither Compel Nor Justify an Employer's Self-imposed Voluntary Quotas or Preferences for Members of Selected Groups

Two Petitioners (Kaiser and the Government) erroneously point to various cases where courts have *required* preferences to be exercised by an employer who has been proven guilty of prior discrimination, alleging that they are authority for the proposition that voluntary preferences can be instituted. *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), addresses this issue. The court there explained that remedial quotas

> "have been allowed by the courts, but *only to correct* past discriminatory practices. In the instant case there has been no showing that the classifications and discriminations on the basis of race to be put into effect by the defendant school district, are to be undertaken to correct past discrimination. [Emphasis in original].
>
> No authority presently exists to uphold a practice which discriminates on racial or ethnic lines which is not being implemented to correct a prior discriminatory situation."
>
> 357 F.Supp. at 250.

Three years after *Anderson,* a decision by another Judge of the same Court struck down another preferential hiring plan, this one adopted by the Berkeley Fire Department. *Brunetti* v. *City of Berkeley,* ____ F.Supp. ____, 12 FEP Cases 937, 11 EPD ¶10,804 (N.D. Cal. 1975). The Court exhaustively reviewed the cases involving judicially-ordered remedial preferences. Its conclusion was that such relief must be severely limited:

> ". . . Each decision ordering or approving preferential treatment for minorities rested upon a specific judicial finding of past discrimination against minorities warranting temporary affirmative relief."
>
> 12 FEP Cases at 939.

The Court held in the case before it, since the record was "totally devoid of any legislative declaration of past, proven discriminatory practices by the City of Berkeley," that indeed

> "Defendants have consistently maintained that the Affirmative Action Program was not launched to rectify prior discrimination in the municipal work force . . . this court must find that no historical justification exists for Berkeley's affirmative action program, and that the program may not be sustained as a remedial measure. In absence of such a justification, the City of Berkeley may not afford preferential treatment to minority employees in violation of the rights of non-minority employees."
>
> 12 FEP Cases at 940-41.

(In this instance, the City of Berkeley had of course misused the phrase "affirmative action" to mean preferential treatment rather than legitimate non-preferential affirmative measures, just as Petitioners often do.)

The California Court of Appeal has now handed down a similar holding, affirming a lower court decision, in a case involving promotions to different positions in the same city's fire department as well as initial hiring for the agency. *Hiatt* v. *City of Berkeley,* 85 Cal. App. 3d 29, 149 Cal.Rptr. 155, 18 FEP Cases 233, 18 EPD ¶8712 (Cal. Ct. App. 1978).

It is thus clear that the body of authority with respect to court-ordered preferential relief in cases of actual proven discrimination is *not* authority for the imposition of such preferences by employers acting on their own initiative, and that indeed such cases frequently contain language expressly barring such self-administered preferences. Unlike "do-it-yourself" quotas, court-ordered preferences are controlled by an impartial tribunal which can oversee their administration or appoint a special master or referee to do so. (See, for example, the use of such a supervisory official in *E.E.O.C.* v. *Local* 638 . . . *Local 28 of the Sheet Metal Workers International Association,* 532 F.2d 821 [2d Cir. 1976]).

For that matter, the cases cited by the Government and Kaiser often show a great judicial sensitivity toward the gross inequities involved even in court-ordered remedial preferences. For example, in *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir., *en banc,* 1971), *cert. denied,* 406 U.S. 950 (1972), the Court, while imposing a remedial preference, nonetheless decried preferential treatment (452 F.2d at 330), struck a provision of the District Court's decree ordering an absolute minority remedial preference (at 331), termed its own less drastic relief a non-quota system because of its temporary nature (at 330), and stated that such relief would not "necessarily result in hiring less qualified minority persons in preference to more qualified white persons" (at 331). (The Court of Appeals ordered that one out of each three fireman hired be minority group members until twenty of the latter had been added to the Minneapolis Fire Department).

Nonetheless, it is argued that since courts may order remedial quotas in cases of proven discrimination, there is no bar to the employer, in the spirit of voluntary compliance with Title VII that the courts seek to foster, simply starting a scheme of preferences on his own. This reasoning is akin to a rationalization that could be advanced by the organizers of a lynching party: "Since courts can impose capital punishment, and since they are certain to do so in the case of this particular murderer, why should we wait for the law? Why can't we 'string him up' right now? After all, *we* know he's guilty!"

That line of thought was decisively refuted by the District Court for the Northern District of Georgia, which was forced to issue a preliminary injunction against the Atlanta Police Department's preferential treatment in favor of blacks. The Department, which was in the midst of a major lawsuit involving alleged employment discrimination against blacks, was warned that it could not institute preferentially remedial measures on its own. The Court explained that it:

> "wishes the parties to understand that if any such preferential or discriminatory action is necessary to overcome the effects of any prior discrimination, *it must* come by court decree—not by a subjective, individualized selection process where there is no opportunity objectively to ascertain the extent of the discrimination, or its necessity within the requirements of the Constitution of the United States. . . .
>
> In short, it is the opinion of this court that possibly unlawful discriminatory personnel changes are occuring so rapidly under the present Police Department's administration that to fail to issue this preliminary injunction might well totally frustrate this Court's power to deal with a difficult situation on a constitutional basis and reserve the field to the unguided, unsupervised, unreviewable, subjective selection process of the present police administration. The Court simply does not believe, under the law and Constitution, that can be tolerated."
>
> *Reeves* v. *Eaves,* 411 F.Supp. 531, 535-36 (N.D. Ga. 1976).

The subject of "do-it-yourself" preferences has recently evoked unfavorable comment from at least one member of this Court; in the concurring opinion of Mr. Justice Powell (at IV, Part B) in *Regents of the University of California* v. *Bakke,*

____U.S.____, 57 L.Ed.2d 750, 98 S. Ct. ___ (1978) (with the caveat noted above at page 8), the repudiation, as unlawful, of attempts to arrogate to non-judicial authorities the power to institute such preference schemes is clearly stated:

> "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. *That is a step we have never approved.* Cf. Pasadena City Board of Education v. Spangler, 427 US 424, 49 L Ed 2d 599, 96 S Ct. 2697 (1976)." 57 L Ed 2d 750, 783-84. (emphasis supplied).

The logic is unassailable: if an employer is indeed a violator of the law (*i.e.*, if he has discriminated without a court having so found), he can hardly be trusted to now go forward and discriminate in remedial fashion to undo his past discrimination (assuming that such a concept makes any sense at all). If, on the other hand, the employer has not discriminated on purpose, or has done so only in the "unintentional" fashion typified by the *Griggs* situation, he should certainly not be allowed to discriminate remedially, since even courts do not always require quotas in such cases. In the present case, there was no discrimination against minorities by Petitioner Kaiser, and thus even less excuse for a self-imposed quota.

Kaiser and the Government also rely on such Second Circuit decisions as *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408 (2d Cir. 1973), and *Patterson* v. *Newspaper Deliverers' Union,* 514 F.2d 767 (2d Cir. 1975). But the current views of the Court of Appeals for the Second Circuit are embodied in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, *rehearing denied,* 531 F.2d 5 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), which is discussed in Point IV-D, *supra.*

Kirkland explicitly states that *Wood, Wire & Metal Lathers* and *Patterson,* as well as other Second Circuit cases where quotas were imposed, met that Court's two prerequisites for justifying such relief. The fact situation in the present case would *not* satisfy the *Kirkland* criteria for a court-ordered remedial quota (quite aside from the fact that Kaiser and the Union had never violated minorities' Title VII rights), let alone a self-imposed quota. We respectfully invite the Court's attention to the exposition of this issue in Point IV-D, *supra.*

All the arguments on behalf of Petitioners that seek to draw analogies between court-ordered quotas to remedy prior discrimination and the one at issue here must grapple with the fact that Kaiser and the Union had not previously discriminated against minority employees. Thus, for example, it is argued that past "societal discrimination" justifies the quota in the instant case. Dissenting Opinion below, 563 F.2d at 234-6. But that assertion is not supported by case law: "no court has gone so far as to impose a quota on an employer who has not himself been guilty of past discrimination in order to remedy historic nationwide or regional practices." (Footnote omitted.) L. Lavinsky, "*Defunis* v. *Odegaard:* The 'Non-Decision' with a Message," 75 *Columbia L.Rev.* 520, 529 (1975).

Were the law otherwise, there would be no stopping point for the imposition of quotas by courts.

Although it is irrelevant, because no valid analogy from court-ordered quotas can be drawn with respect to the instant case, Kaiser's Brief (at 39) and the Government Brief (*e.g.*, at 52-4) emphasize that some courts have awarded preferential relief covering non-identified victims of discrimination. (Con-

trary to Kaiser's implication at 40, *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 [1976] does *not* uphold the substantive validity of that position. 424 U.S. at 773, n.32 and accompanying text.) It is true that some lower courts have awarded "class-wide" preferential relief in cases of actual discrimination, but such decisions are not in point here, where there were *no* minority victims, identified or otherwise, of prior discrimination by Kaiser.

Even in cases of proven deliberate discrimination, a court-imposed quota remedy can be denied if less drastic measures will suffice to correct the prior discrimination in question. *Harper* v. *Mayor and City Counsel of Baltimore,* 359 F. Supp. 1187, 1213-16 (D. Md. 1973), *modified on other grounds and affirmed sub nom. Harper* v. *Kloster,* 486 F.2d 1134, 1136 (4th Cir. 1973). This Amicus thinks that rule a wise one, and for that reason would not ask for a remedial quota in behalf of white victims of reverse discrimination. *Cf.* E.E.O.C. Decision No. 75-57, 8 FEP Cases 554, CCH E.E.O.C. Decisions ¶6420 (1973).

This Amicus would also bring to the attention of the Court two other recent cases wherein Courts of Appeals have refused to impose quotas for proven prior discrimination: *Sledge* v. *J.P. Stevens & Co.,* ____F.2d____, 18 FEP Cases 261, 275-79, 18 EPD ¶8657 (4th Cir. 1978); and *Mitchell* v. *Mid-Continent Spring Co. of Kentucky,* 583 F.2d 275 (6th Cir. 1978).

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), a school segregation case cited by Petitioners as authority for racial consideration in fashioning a remedy for prior discrimination and its effects, accords. Under the heading "Racial Balances or Racial Quotas," Mr. Chief Justice Burger stated, "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at 24. If the Court rejects quotas in a public school

situation where no pupil and no teacher will lose a place for racial reasons, there is all the more reason for it to reject Petitioners' flagrantly discriminatory quota scheme.

POINT V: ANYONE, INCLUDING MINORITIES AND WOMEN, CAN BECOME A VICTIM OF REVERSE DISCRIMINATION

It must be emphasized that a widespread myth about reverse discrimination is untrue: contrary to popular belief, the direct victims of this phenomenon are *not* limited to the class of white males. In some cases, members of one group who have historically been a target for discrimination are discriminated against in the name of helping members of another such group. For example, a New York Court has upheld the New York City Commission on Human Rights' finding in favor of a black complainant who had been discriminated against because the local school board wanted to award the position in question—a deputy superintendency—to an Hispanic applicant. In re *City Commission on Human Rights* (Community School Board No. 4), No. 40523/75 (Supreme Court, N.Y. County 1975); *N.Y. Post,* July 2, 1975, at 11.

Conversely, in the California state higher education system, several Mexican-Americans recently brought a federal class action against a state-run college for favoring blacks over them in employment and educational programs. *Crofts* v. *Board of Governors of California County Colleges,* Civil No. 75-337 (N.D. Cal., filed Feb. 18, 1975); *Los Angeles Herald Examiner,* Feb. 20, 1975, at A-7. (The suit was settled by a consent decree providing, *inter alia,* for "goals and timetables" benefiting Mexican-Americans in hiring.)

Among the cases where women have made charges of reverse racial discrimination are E.E.O. C. Dec. No 75-268, 10 FEP Cases 1502, CCH E.E.O.C. Dec. ¶6452 (1975) and *Silverman* v. *University of Colorado,* 541 P.2d 93,99, 11 FEP Cases 1462, 1466, *reversed,* 555 P.2d 1155 (Colo. 1976). On the other hand, a black man filed a charge with the Minnesota

State Department of Human Rights, claiming that the University of Minnesota officials had rejected him for a personnel position, which, they said, was reserved for female applicants only. B.R. Epstein & A. Forster, *Preferential Treatment & Quotas* 30 (Anti-Defamation League of B'nai B'rith Pamphlet, 1974).

And in *Hupart* v. *Board of Higher Education of the City of New York,* 420 F. Supp. 1087 (S.D.N.Y. 1976), Asian-Americans were subjected to reverse discrimination in the choice of entrants to a six-year combined college and medical school program. *Id.,* 1103. This, of course, is only to be expected, inasmuch as what Petitioners are propounding here is that all employers and unions be given *carte blanche* to discriminate in favor of whichever minorities they prefer and against whatever *non-minorities* and *minorities* they please. Thus, no one is really safe from being a victim of reverse discrimination.

As further evidence of this problem, we respectfully invite the Court's attention to a recent newspaper article, "Blacks and Women Clash on Access to Jobs and Aid," New York *Times,* Feb. 20, 1979, at A-10.

It should also be noted that, perhaps because of their awareness of these matters, 64% of non-white Americans reject the idea of preferential treatment, 27% favor it, and 9% have no opinion. (The national figures for all Americans are 83% opposed, 10% in favor, and 7% with no opinion.) Press release, The Gallup favoring May 1, 1977, at 3, summarized in New York *Times,* May 1, 1977, at 33.

(While a more recent Louis Harris poll showed a majority of *whites* favoring "affirmative action," the responses in that survey specified that such measures should be carried out without "rigid quotas." New York *Times,* Feb. 21, 1979, at A-14.)

POINT VI: REVERSE DISCRIMINATION IS MORALLY WRONG

One of the philosophical bases of the position of this Amicus is found in the writings of Aristotle, who distinguished two different varieties of justice. Commutative (also called corrective or rectificatory) justice prescribes that one who has harmed another by means of a civil wrong, such as a tort or breach of contract, "should compensate the victim in an amount equal to the harm thus caused." The other type, distributive justice, "is designed to distribute the honors or rewards of a society among its members in proportion to their merits." E.W. Patterson, *Jurisprudence* 391 (1953); E. Barker, *The Politics of Aristotle* 363 (Oxford Galaxy, paperback 1962). Clearly, those who espouse preferential treatment are confusing these two kinds of justice. They are applying the principle of rectificatory justice to a situation where distributive justice, which in the Aristotelian scheme corresponds to the merit system, should govern. Despite the fact that our society has indeed done grievous harm to members of minority groups and women by denying them their rightful opportunities for self-fulfillment, the remedy does not lie in doing the same thing—ironically in the name of justice—to innocent members of other groups.

Another underpinning for this belief is found in a concept developed by the late American legal philosopher Edmond Cahn, a professor at New York University School of Law.

Cahn believed that we can ascertain what is just and right only from the "consumer perspective." He contrasted this viewpoint with the "imperial" or "official" perspective. Cahn was not referring to what we now call "consumer protection" or "consumerism." He meant the viewpoint of the *individuals* affected by the problem involved and by efforts to solve it. Cahn saw that it is always one or more individuals who *consume* the results of the decisions made by officialdom, and that justice or injustice of governmental decisions (or other

authoritative actions) must be assessed from the standpoint of those individuals, not from that of the decision makers.

This way of looking at things, said Cahn, can be compared to the "official or imperial perspective"—that of administrators, bureaucrats, legislators or other decision makers in the public or private sectors. These people, often with the best of motives, tend to ignore, downgrade or violate individuals' interests in order—so they say—to best serve those of "society," or of some governmental or other entity such as a school, association, corporation, municipality or group of persons. That this may often entail cruelty and inflict suffering on specific individuals, with or without visible benefits to the entity involved, is deemed irrelevant by those who take this perspective. At the most, they say , such unfortunate factors must be subordinated to various paramount considerations, which include "the necessity for showing respect for expert judgment and administrative convenience" and "the necessity of leaving certain wrongs, however grievous they may be, to the province of morals." These and other examples of phrases and maxims used to justify injustices to individuals (although they have their proper uses as well) were set forth by Professor Cahn. See E. Cahn, *The Predicament of Democratic Man,* 17-42 (1961); E. Cahn, "Law in the Consumer Perspective," 1'2 *U.Pa. L. Rev.* 1 (1963).

The application of this reasoning to reverse discrimination is obvious. Whether or not it is "true" discrimination is a question that must be determined from the standpoint of the victim, not from that of society in general. Viewed from this proper perspective—that of the true consumer of the act—it is discrimination as injurious and cruel, if not more so, as the original acts of bigotry which we vainly hoped would be halted by the passage of civil rights laws. The victim of any act of discrimination, be he a member of the majority or of a minority, is truly a consumer of injustice. If he asks a government agency to counteract some decision maker's policy of reverse discrimination, and is rebuffed—perhaps because the policy was implemented at the behest of that same agency—his

lot is even more bitter. This particular fate does not befall victims of "traditional" discrimination.

There is little need to quote the vast literature attacking reverse discrimination written by those who align themselves with various philosophies known as "conservatism." The antipathy of conservatives to this particular evil is well known. But it might be worth quoting a liberal spokesman, a young philosopher who wrote an article published in *The Humanist* magazine, about how he became a victim of reverse discrimination when a state university denied him a job so that it could hire a woman (and admitted this fact in writing):

> "Many of my friends, comrades in political philosophy and causes, expressed surprise and dismay over my new found 'conservatism.' The entire affair provoked the following reflections.
>
> Too much of so-called liberal or progressive thinking today is in fact illiberal, unprogressive, and unintelligent. The essence of liberalism has always been concern with the welfare, rights and responsibilities of *individuals qua individuals,* not the masses or classes or other such linguistic abstractions. Furthermore, although there has been disagreement among liberals as to what social arrangements might best liberate individual capacities, no disagreement exists with the thesis that illiberal means, means that impose *avoidable* injustices on individuals, cannot achieve just ends.
>
> Therefore, when my letter-writing liberal or radical critics and friends explain that "in social situtations no one is truly innocent" or that "power is the name of the game" or that in effect, if one is a white male he is "guilty" of job discrimination because other white males have so discriminated and therefore "reparations" are justified and required—something seems peculiar. We find here no concern for the

individual. What the person *did* as a person is irrelevant. His gender and race in some mysterious way render him guilty of offenses and deserving of admittedly unfair treatment. It hardly needs to be said that such proposals are neither liberal nor intelligent much less morally intelligible.

Commonsensically, racial, ethnic, or sexual classes do not seek employment; individuals do. Commonsensically, discrimination is making racial, ethnic, or sexual classifications relevant criteria for jobs in which such criteria are clearly irrelevant to performing the task. As we know, the consequences of making such classifications conditions for employment have been amply and notoriously experienced by individuals who are black, female, Mexican-American, or other. To claim now that these criteria *are* relevant to employment when used to even the score for the "good guys" is literally doublethink. The proposal that such doublethink can serve as a principle of social and economic justice is a classic example of the foolish attempt to secure just ends (equal job opportunity) through unjust means (reverse discrimination). Yet, now we face the specter of a government-administered program trying to accomplish this impossible feat and thereby perpetuating the very abuses that genuinely progressive people have labored so long to eliminate.

I conclude therefore, that labeling support of Affirmative Action programs of the sort discussed 'liberal' or 'progressive,' is not only mistaken, but slanderous."

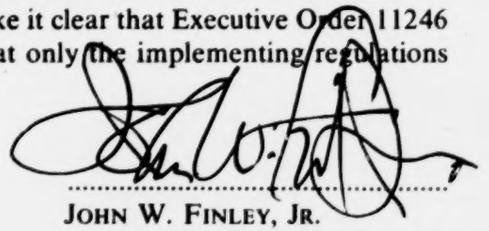
L. Nisbet, "Affirmative Action—A Liberal Program?", in B. R. Gross (ed.), *Reverse Discrimination* 50, 52-3 (1977).

CONCLUSION

Blatant racial discrimination has excluded Respondent Weber from his rightful opportunity to enter a craft job training program at Kaiser's plant.

The Courts below recognized this and acted accordingly, declaring the practices of Petitioners illegal.

However, while the decision below should be affirmed, it should be corrected to make it clear that Executive Order 11246 is unobjectionable and that only the implementing regulations thereunder are illegal.



New York, New York
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